No. 92-1223

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

U.S. DEPARTMENT OF DEFENSE, U.S. DEPARTMENT OF NAVY, NAVY CBG EXCHANGE, CONSTRUCTION BATTALION CENTER, GULFPORT, MISSISSIPPI, and the U.S. DEPARTMENT OF DEFENSE, ARMY AND AIR FORCE EXCHANGE, DALLAS, TEXAS,

Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

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BRIEF FOR RESPONDENT AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

The opinions below, the basis of this Court's jurisdiction, the statutes involved and a full statement of the case are set out at pp. 1-14 & 1a-6a of the brief for respondent Federal Labor Relations Authority and, in the interest of avoiding needless duplication, are incorporated by reference—rather than restated—in this brief.

SUMMARY OF ARGUMENT

The issue presented in this case—which arises under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.* ("Federal Labor Statute")—is whether the most basic policies of that Act should

play any role in a major area of its administration, *viz.*, in determining whether a union acting as the exclusive collective bargaining representative of federal sector employees—having been selected by those employees through the secret ballot electoral processes provided by federal law—is entitled to the disclosure of personnel records of bargaining unit employees when such disclosure is "necessary for the full and proper" performance of that representative's collective bargaining functions. 5 U.S.C. § 7114(b)(4).

Petitioners' contention is that—because of the interpretation given to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 522, in *U.S. Dept. of Justice v. Reporters Committee*, 489 U.S. 749 (1989), and because of the interplay of the Federal Labor Statute, the Privacy Act, 5 U.S.C. §552a, and the FOIA—this issue must be resolved without any consideration being given to the weighty Federal Labor Statute concerns at stake. On that approach, privacy interests of federal employees must *always* outweigh the interests of federal sector unions in acquiring such information, even though the intersection of the Privacy Act and FOIA creates a limitation only on disclosures that would constitute "clearly unwarranted invasions of personal privacy." 5 U.S.C. § 552(b)(6).

Petitioners' position is not justified by the language, structure, or background of the relevant legislative materials, nor by the *Reporters Committee* decision. That position is at war with the Federal Labor Statute's statement of the strong public interest in an effective federal sector collective bargaining system and with the conception of effective collective bargaining—drawn from the National Labor Relations Act—that Congress intended to embody in the Labor Statute. *See* 5 U.S.C. § 7101(a); *see also* pp. 4-6 & 11-12, *infra*. Indeed, every court that has examined the information request at issue here—seeking the mailing addresses of bargaining unit members—has found that disclosure would represent a relatively

minor intrusion into personal privacy interests, while nondisclosure would substantially undermine the effectiveness of the federal collective bargaining system. *See* pp. 8-13, *infra*.

The *Reporters Committee* decision—upon which petitioners principally rely—does not support the extreme proposition that the petitioners advocate, *viz.*, that in the context of a disclosure request arising from a statute other than FOIA, where FOIA becomes relevant because of cross-references in other statutes that incorporate FOIA's terms, the public interests articulated in the statute under which the information request arose may not be considered in applying the balancing tests set out in FOIA. *See* pp. 14-19, *infra*. Indeed, the text of FOIA—and this Court's *Reporters Committee* test for determining "unwarranted" invasions of privacy—is fully compatible with incorporating into the FOIA analysis the public interests articulated in the Federal Labor Statute. *See* pp. 16-21, *infra*.

The language in *Reporters Committee*—which petitioners seek to take out of context—focuses on the situation in which a plaintiff who seeks information both relies on FOIA *standing alone* for his right to the information and attempts to rely on public interests *not articulated in FOIA* to support his claim. In this case—unlike *Reporters Committee*—the union is not asking this Court to assess vague "public policies" that are articulated in no relevant congressional enactment. *See* pp. 18-19, *infra*. Rather, the issue here is whether policies clearly and strongly articulated by Congress in the statute on which the union bases its claim should be given effect. *See* pp. 19-21, *infra*.

Recognizing the incongruity of asking this Court to hold that Congress intended the Federal Labor Statute to be interpreted in a manner that would seriously hinder effective collective bargaining, petitioners offer that, under their construction of the statutes in question, some necessary personnel information can still be made available under Privacy Act "routine use" regulations. *See*

pp. 21-22, *infra*. But what petitioners "reassurance" in this regard shows is that agency managements are *not* in fact "prohibited by law" from furnishing the information at issue; but rather, have arrogated to their discretion the judgments on Federal Labor Statute disclosure that Congress intended to be made by the FLRA, an independent and expert agency. *See* pp. 22-25, *infra*.

ARGUMENT

1. This is an unfair labor practices case that arises under, and has been prosecuted through the processes provided by, the Federal Labor Statute. The issue presented turns on the nature and dimension of the Federal Labor Statute right of a union—once it has been elected as the exclusive bargaining representative of an appropriate bargaining unit of employees of a federal agency, through the secret ballot electoral processes provided by federal law—to secure from the agency "reasonably available" personnel information that is "necessary for the full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining," and on the corresponding Federal Labor Statute obligation of the federal agency to provide that information on the union's request. *See* 5 U.S.C. § 7114(b)(4).

Despite all that being so, the parties all agree that the case turns on the proper method of interpreting Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6), and, even more particularly, the phrase "clearly unwarranted invasion of personal privacy" contained therein. Indeed, the crux of the disagreement here is the proper method of reading this Court's decision in *U.S. Dept. of Justice v. Reporters Committee*, 489 U.S. 749 (1989), which construed FOIA Exemption 7(C) and its phrase "unwarranted invasion of personal privacy." In this regard, the petitioner federal agencies argue here that *Reporters Committee* governs the instant case and dictates that this case be decided *as if it were* a FOIA case and without any regard to the fact that *it is instead* a Federal Labor Statute case.

Given how far afield we have come, it facilitates analysis to begin by outlining the series of statutory cross-references that have brought us to this point.

2. The Federal Labor Statute rests on Congress' conclusion that "labor organizations and collective bargaining in the civil service are in the public interest." 5 U.S.C. § 7101(a).[1] Based on this conclusion, Congress enacted a "scheme governing labor relations between federal agencies and their employees" that, as this Court has explained, "significantly strengthened the position of public employee unions while carefully preserving the ability of federal managers to maintain 'an effective and efficient Government'." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 92 (1983) (*quoting* 5 U.S.C. § 7101(b)).

Congress, in order to ensure that federal agencies would act in conformity with its judgment that collective bargaining serves the public interest, imposed on each agency "a duty to bargain collectively [and] in good faith" with the labor organization that has been selected through the statutory election processes as the exclusive representative of an agency's employees. 464 U.S. at 92 (*citing*

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[1] As Congress fully set forth in the statutory text:

> The Congress finds that—
>
> (1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—
>
> (A) safeguards the public interest,
>
> (B) contributes to the effective conduct of public business, and
>
> (C) facilitates and encourages the amicable settlement of disputes between employees and their employers involving conditions of employment.
>
> * * * *
>
> Therefore, labor organizations and collective bargaining in the civil service are in the public interest. [5 U.S.C. § 7101(a)]

5 U.S.C. § 7116(a)(5)). In order to ensure that the collective bargaining system would operate effectively and efficiently Congress further specified that agencies must

> furnish to the exclusive representative involved, or its authorized representative, upon request and, *to the extent not prohibited by law*, data . . . which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. [5 U.S.C. § 7114(b)(4).]

It is this provision—and, in particular, its cross-reference to, and its exclusion of, disclosures of data "prohibited by law"—that generates this litigation.

Given the nature of our government, there are scores of laws that prohibit the disclosure of government data. The pertinent law here is the Privacy Act, 5 U.S.C. § 552a. In general terms, that Act provides:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains. . . . [5 U.S.C. § 552a(b).][2]

Given its potential scope, the Privacy Act tempers that prohibition through 12 exemptions. One such exemption covers situations where "disclosure of the record would be . . . required under section 552 of this title [the Freedom of Information Act]." *Id.* § 552a(b)(2).

The FOIA, in its turn, while broadly mandating disclosure of public records, tempers that provision with 9 exemptions. And, as already noted, Exemption 6 permits

[2] The Privacy Act defines the word "record" to include "any item, collection, or grouping of information about an individual that is maintained by an agency." 5 U.S.C. § 552a(a)(4). The Act defines "system of records" as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol or other identifying particular assigned to the individual." *Id.* § 552a(a)(5).

nondisclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

In sum, the path that must be followed here goes (1) from the Federal Labor Statute's general command that each agency must disclose relevant collective bargaining information to an exclusive representative, subject to the limitation that no such disclosure is required if prohibited by law, (2) to the Privacy Act's general command that there be virtually no disclosures of personally identifiable records, subject to a limitation for information disclosable under the FOIA, (3) to the FOIA's general command that virtually all records be disclosed, subject to the limitation in FOIA Exemption 6 for disclosures of personnel records that "would constitute a clearly unwarranted invasion of personal privacy." And the ultimate point of the quest is to determine whether the *Federal Labor Statute* mandates the disclosure to an exclusive bargaining representative, by a federal agency, of such basic information as the names and addresses of the employees in the bargaining unit that the exclusive representative represents.

3. Given the complexity of this decisional tree, it is important to cut away as much of the underbrush as is possible as quickly as possible.

Since the Federal Labor Statute's disclosure duty is limited by the phrase "to the extent not prohibited by law," all agree that the Federal Labor Relations Authority must, in applying § 7114(b)(4), examine laws other than the Labor Statute.

Similarly, all agree that where another statute prohibits disclosure of information by an agency in *unequivocal terms*, the Federal Labor Statute contemplates nondisclosure.[3]

[3] *See, e.g.*, Fed. R. Crim. P. 6(e) (secrecy of grand jury records); 13 U.S.C. §§ 8(b), 9(a) (secrecy of information furnished for census purposes); 42 U.S.C. §§ 2165, 2167, 2168 (secrecy of atomic energy information).

The dispute in this case is over the question of whether the Federal Labor Statute allows the FLRA, when the other federal statute at issue *conditions* its nondisclosure policy on *the balancing of competing interests*, to include in the balance the congressionally declared public interest in effective collective bargaining. The FLRA has answered this question "yes"; petitioners would have it answered "no."

It is of equal importance to emphasize the significance of how this question is answered. Given the breadth of the Privacy Act, if petitioners are right, a union serving as federal employees' exclusive representative, has virtually no right of access to information from the personnel records of those the union represents, regardless of how crucial the records might be to the union's roles as the employees' representative in collective bargaining, in investigating grievances, or in presenting arbitrations. Under such a regime, the ability of the union to effectively perform its functions as exclusive representative—and the ability of the federal labor relations system to provide for effective collective bargaining—would be greatly diminished.[4]

4. Having said that much, it is time to return to the starting point—the Federal Labor Statute. When we do so, we see that, *in terms of the collective bargaining system* contemplated by the Labor Statute, a federal agency's disclosure to a union of the home addresses of the employees the union represents would *not* (in the words of the relevant FOIA provision) "constitute a clearly unwarranted invasion of personal privacy."

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[4] Petitioners have urged that, in the case of some agencies, unions could, under certain circumstances, obtain such personnel records under the agency regulations implementing the Privacy Act's "routine use" exception, 5 U.S.C. § 552a(b)(3). The inadequacy of petitioners' response in this regard is discussed at pages 21-25, *infra*.

First, the Federal Labor Statute establishes a strong public policy of promoting an efficient and effective system of federal sector collective bargaining. 5 U.S.C. § 7101(a). It is clear that this public policy is served by information disclosures that allow for direct communication between an exclusive representative and *all* the members of the bargaining unit whom it represents—whenever the union may see the need for such communication, in confidence, and in an atmosphere free of employer influence or (real or perceived) employer surveillance.

Such communication is essential so that an exclusive representative can, *e.g.*, account for the actual needs and honest desires of all those in its unit as it formulates its agenda; explain its role in the system of collective bargaining to the bargaining unit membership; monitor the workplace by enlisting the assistance of those it represents; and gather witnesses as part of its investigation and presentation of grievances. Access to employee names and addresses—which allows unions to communicate with unit members through mailings to their homes, rather than through contacts at the employer-dominated workplace—is essential to a union's ability to engage in such free, independent, and unobserved communication with the bargaining unit. As the FLRA concluded,

> [T]he communication between unit employees and their exclusive representative which would be facilitated by release of names and home addresses . . . is fundamentally different from other communication through alternative means which are controlled in whole or in part by the agency. When using direct mailings, the content, timing and frequency of the communication is completely within the discretion of the union and there is no possibility of agency interference in the distribution of the message. Further, direct mailings reach unit employees in circumstances where those employees may consider the union's communication without regard to the time con-

straints inherent in their work environments, and in which any restraint the employee may feel as a result of the presence of agency management in the workplace is not present. [*Farmers Home Administration*, 23 FLRA 788, 796-797 (1986) (*quoted in U.S. Department of Defense v. FLRA*, 975 F.2d 1105, 1108 (5th Cir. 1992) (reprinted at Pet. App. 6a)).][5]

The public interest in facilitating such communication is heightened further by the fact that, under the Federal Labor Statute, the labor organization is the *exclusive* representative of the bargaining unit, so that employees may be particularly disadvantaged if their union cannot reach them to solicit their views and obtain their guidance on basic labor relations issues. The Federal Labor Statute, moreover, mandates that labor organizations acting as exclusive representatives *must* "represent[] the interests of *all* employees in the [bargaining] unit . . . without discrimination and without regard to labor organization membership," 5 U.S.C. § 7114(a)(1) (emphasis added), a mandate that presupposes a union's ability to ascertain and account for the views and interests of *all* bargaining unit employees.[6]

[5] The need for unions to be able to communicate with bargaining unit members through the mails is, of course, even more compelling when—as is common in federal employment—the bargaining unit is dispersed over many worksites and over a wide geographic area. In such circumstances, it is simply infeasible for a union to rely on worksite contacts as the principal means for establishing communication with employees.

The bargaining unit represented in this case by this respondent's local union vividly illustrates this point. American Federation of Government Employes Local 1345 represents a "world-wide" bargaining unit of Army and Air Force Exchange Service employees located at more than 70 separate facilities in all parts of the United States (including facilities in Alaska) and at facilities in Germany, Guam, and Okinawa.

[6] Petitioners contend that the only union interest in disclosure of employee addresses is its interest in the addresses of those who have consciously chosen not to become union members and, out of

The Federal Labor Statute's scheme of collective bargaining and representation—including its concepts of exclusive representation, good faith bargaining, and fair representation—is, of course, generally modelled on the principal labor relations statute in the private sector, the National Labor Relations Act ("NLRA").[7] It is thus particularly instructive that, under the NLRA, it has long been well settled that employers are obligated, as part of their duty to bargain in good faith, to furnish certified or recognized unions, upon request, with the names and addresses of all bargaining unit members. The basis of these holdings is that disclosure of such information is relevant and necessary for effective collective bargaining. *See, e.g., NLRB v. Associated General Contractors*, 633 F.2d 766, 773 (9th Cir. 1980), *cert. denied*,

privacy concerns, not to otherwise give the union their addresses. *See* "Br. Pet." at pp. 3 & 29.

Petitioners' assumption in this regard has no basis. A new employee, for example, if not subject to union mailings or any previous experiences in a unionized setting, may have little contact with union personnel, no full understanding of union services or the collective bargaining system, and therefore no reason to initiate contacts with the union. The failure of such an employee—who is far from atypical—to provide the union with a home address is probably far more a function of unfamiliarity with the union and its services (or simply inertia) than a function of some conscious privacy-based choice.

[7] *See, e.g.*, § 7101(a) (resting the finding that "labor organizations and collective bargaining in the civil service are in the public interest" on "experience in both private and public employment"); *EEOC v. FLRA*, 476 U.S. 19, 23 (1986) (noting similarity in language between certain NLRA and Federal Labor Statute provisions and following NLRA interpretation in construing such Federal Labor Statute provisions); *Bureau of Alcohol, Tobacco, & Firearms, supra*, 464 U.S. at 92-93 (noting that Federal Labor Statute was generally modelled on NLRA and FLRA was generally modelled on NLRB). *Cf. Letter Carriers v. Austin*, 418 U.S. 264, 274 (1974) (noting that Executive Order which was precursor to current Federal Labor Statute "adopted in large part the provisions and policies of the NLRA as its model" so that NLRA precedents are relevant to its proper interpretation).

452 U.S. 915 (1981); *NLRB v. Pearl Bookbinding* 517 F.2d 1108, 1113 (1st Cir. 1975); *United Aircraft v. NLRB*, 434 F.2d 1198, 1204-1206 (2d Cir. 1970), *cert. denied*, 401 U.S. 993 (1971); *Star Tribune*, 295 NLRB 543, 565 (1989); *Massillon Community Hosp.*, 282 NLRB 675, 682 (1987); *Georgetown Holiday Inn*, 235 NLRB 485, 486 (1978). *See generally* Pet. App. 14a & n.3 (noting NLRA cases) *FLRA v. U.S. Dept. of Treasury*, 884 F.2d 1446, 1458 (D.C. Cir. 1988) (R. B. Ginsburg, J. concurring) (same), *cert. denied*, 493 U.S. 1055 (1990).

Second, by any realistic assessment, the personal privacy interests invaded by the disclosure of an employee's home address are minimal at best.

For the overwhelming majority of employees, the information disclosed is already in the public domain. It is freely available and widely distributed in local telephone directories, and, since it is included in voter lists, license records, and other public documents, it is often a matter of public record. Most individuals disclose this information in a variety of casual commercial transactions, and many display the information on the face of their personal checks. Indeed, many coworkers will probably already possess general knowledge relating to an employee's home address (*e.g.*, the employee's neighborhood, town, commuting behavior, etc.). And, knowledge of an employee's home address will virtually never convey a seriously pejorative or embarrassing connotation. For these reasons, courts have generally not viewed the disclosure of home addresses, standing alone, as a substantial invasion of privacy.[8]

[8] *See, e.g., FLRA v. U.S. Dept. of Navy*, 966 F.2d 747, 756 (3d Cir. 1992) (*en banc*) ("Home addresses . . . warrant a lesser degree of privacy because they do not implicate embarrassing or humiliating facts"); *FLRA v. U.S. Dept. of Treasury*, *supra*, 884 F.2d at 1460. (R. B. Ginsburg, J., concurring) ("An individual's mailing address . . . has no pejorative connotations. The local phone book prints names and addresses for most permanent residents of a community."); *U.S. Dept. of Air Force v. FLRA*, 838 F.2d 229, 232 (7th Cir. 1988) (Easterbrook, J.) ("Most home addresses are in the telephone book, freely available to anyone interested."), *cert. dismissed*, 488 U.S. 880 (1988).

Disclosure of an employee's home address to the exclusive bargaining representative may, of course, subject the employee to a relatively modest volume of unsolicited mailings from that representative; but this fact certainly does not impose any significant invasion of privacy. Assuming the mailings are unwanted, they are a minimal addition to the "junk mail" which virtually all individuals receive, as a matter of course, throughout their lives. Individuals are able to dispose of such mail with minimal effort through the "short, though regular, journey from the mailbox to the trash can." *Lamont v. Commission of Motor Vehicles*, 269 F.Supp. 880, 883 (S.D.N.Y. 1967), *aff'd*, 386 F.2d 449, *cert. denied*, 391 U.S. 915 (1968). As Judge Easterbrook wrote, the fact that mail usually "comes in response [to a disclosure of one's address] does not substantially impinge on seclusion; the addressee may send it to the circular file." *U.S. Dept. of Air Force v. FLRA*, *supra*, 838 F.2d at 232.[9]

Given the relative weights of these interests, it is not surprising that the FLRA—*and every court that has weighed one of these interests against the other*—has reached the same conclusion: *viz.*, when judged against the public interest in effective collective bargaining, the disclosure of an employee's home address to that employee's exclusive representation is *not* "a clearly unwarranted invasion of personal privacy." *See* Pet. App. 11a-12a (listing cases).

[9] For many employees, of course—including many non-members of the union—these mailings will not be unwanted "junk." Even if unsolicited or unexpected, the mailings will have been made by the organization that has been statutorily charged with the role of serving as the employee's exclusive bargaining representative, and the mail may convey valuable information that is directly related to the security and quality of the employee-recipient's work life.

5. Petitioners do not dispute the proposition that the invasion of privacy worked by the disclosure of employee names and addresses to an exclusive bargaining representative would be "clearly warranted"—rather than "clearly unwarranted"—*if balanced against the public interest in an effective collective bargaining system*. Rather, petitioners contend that, in assessing whether an invasion of privacy is "clearly unwarranted" within the meaning of FOIA Exemption 6, the public interest in an effective collective bargaining system *simply cannot be considered*.

In essence, petitioners' argument is that Congress, in passing the Federal Labor Statute, created an interplay between that statute, the Privacy Act, and FOIA that *excludes* any consideration of the public interests embodied in the Federal Labor Statute itself. On that supposition, in any given case, the public interest in a successful collective bargaining system (no matter how great) is always to be subordinated to an employee's privacy interest (no matter how minor, and no matter how easily that privacy interest would be overcome by other public interests). *See, e.g.*, Br. Pet. 15 ("The key dispute in this case concerns what is weighed on the public interest side of the balance under FOIA Exemption 6. . . . Collective bargaining interests may not be weighed in the balance.").

Petitioners' position rests on their reading of *Reporters Committee, supra*. Petitioners read *Reporters Committee* as they do—and place their reliance on the Court's decision so read—for the simplest of reasons: They have no viable alternative. Prior to that decision, *every court that had examined the issue presented here* had held (a) that the language, structure, and purposes of the relevant statutes—including FOIA Exemption 6—provide for consideration of the Federal Labor Statute's declaration of a public interest in an effective collective bargaining system; and (b) that, in terms of that public interest, disclosure of employee names and addresses to the employees' exclusive representative is "clearly warranted," *not*

"clearly unwarranted." *See* Pet. App. 11a-12a (listing cases). And, as we now show, *Reporters Committee* does *not* compel a contrary conclusion.

The *Reporters Committee* decision

> *hold*[*s*] as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted." [489 U.S. at 780 (emphasis added).]

That holding cannot be said to determine the outcome of this case which has nothing to do with law enforcement records, purely private citizens, or records the Government is simply storing, and does have to do with official information, albeit of a unique kind.

But, say petitioners, the *Reporters Committee* Court, on the way to reaching that holding, articulated two operational rules for implementing FOIA, that do control here. As they put it, the decision

> made clear that the purpose of FOIA is to make available "[o]fficial information that sheds light on an agency's performance of its statutory duties" (489 U.S. at 773), and the Court further held that neither the identity of the requesting party nor the specific purpose of the request is relevant (*id.* at 771). Those principles make clear that there is no interest under FOIA favoring the release of information that facilitates collective bargaining but does not shed light on what the government is "up to." [Br. Pet. 12-13.]

And, petitioners add, "[T]here is no statutory basis on which to construct two FOIA tests, one for requests aris-

ing under FOIA and one for requests originating under the Labor Statute." [Br. Pet. 16-17.]

The petitioners vastly overread *Reporters Committee*.

The "FOIA *test*" set out in *Reporters Committee* is a far more general one than petitioners allow; it is *not* a test comprised of the two specific operational rules for implementing FOIA Exemption 7(C) that petitioners note. The only statutory test announced in *Reporters Committee* is:

> Exemption 7(C) requires us to balance the privacy interest in maintaining as the Government puts it, the "practical obscurity" of the rap sheets against the public interest in their release. [489 U.S. at 762.]

The office of the rules quoted by petitioner is to fill in the "public interest in . . . release" side of this balance in the context of the *Reporters Committee* case. *Reporters Committee*, after setting out the test just quoted, proceeds by discussing the "personal privacy" side of the balance (Part IV, 489 U.S. at 762-771) and then the "public interest in release" side (Parts V & VI, *id.*, at 771-780). The portions of the opinion petitioners quote are in Part V which "address[ed] what factors might *warrant* an invasion of the [privacy] interest described in Part IV." 489 U.S. at 749 (emphasis in original).

For present purposes, the critical point is that those rules are *not* generated by Exemption 7(C)'s (or Exemption 6's) *language* or by any *statutory provision* defining that language in whole or in any of its parts or by any *statutory provision* defining the phrase "public interest in . . . release." In terms of ordinary meaning, an action that affects privacy is "clearly unwarranted" only if the considerations that in fact caused the action are insufficient to justify the action. And the ordinary meaning of "public interest in . . . release" is far broader than the interest in "open[ing] agency action to the light of public scrutiny," 489 U.S. at 772.

Indeed, it was precisely because of the breadth of the phrase "public interest" that the Court proceeded as it did. While Part IV of *Reporters Committee* begins from the "common law and the literal understandings of privacy," 489 U.S. at 763, and then proceeds to a consideration of whether that understanding is carried forward in the FOIA, Parts V and VI of the opinion (which deal with the "public interest . . . in release" language) do not attempt any such analysis of the terms "public interest" or "unwarranted"; but instead draw a series of discrete lessons—what we have labeled operational rules—from the limited guidance provided by the overall structure and purposes of the FOIA *standing alone*. And, as Part VI of *Reporters Committee* makes explicit, in light of the uncertainty inherent in that approach, the Court in drawing up those rules was strongly influenced by its recognition that it is unusual to "assign[] federal judges the task of striking a proper case-by-case, or ad hoc, balance between individual privacy interests and the public interest in the disclosure of criminal-history information without providing those judges standards to assist in performing that task." 489 U.S. at 776. Parts V and VI of *Reporters Committee*, in other words, do *not* purport to establish *the* meaning of "unwarranted" or of the "public interest . . . in release" for all times and all contexts but only to provide workable standards for the run of pure FOIA cases such as the one before the Court.

The sum of the matter, then, is that nothing in *Reporters Committee* forecloses the consideration of *all* the relevant "public interests in . . . release" at stake in a case such as this case. What the decision establishes is the very limited range of relevant "public interests in . . . release" generated by the FOIA *standing alone*. And, what *Reporters Committee* does not address—much less determine—are the rules for elaborating "the public interest in . . . release" in a context in which the FOIA does *not* stand alone but is incorporated by reference in

another statute. That is the question of first impression presented here.

In answering that question, this Court is presented with a qualitatively more difficult task than the one the Court did confront in *Reporters Committee*. Here the Court has the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, [a task which] necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *United States v. Fausto*, 484 U.S. 439, 453 (1989). And, as we now show, every consideration supports the proposition that in a case arising in the context of the interplay of the Federal Labor Statute, the Privacy Act, and FOIA—as opposed to one arising in the pure FOIA context of *Reporters Committee*—the interest in an effective federal collective bargaining system may (and should) be included on the "public interest in . . . release" side of the Exemption 6 balance.[10]

(i) We begin by reemphasizing that *Reporters Committee* does not rest its refusal to consider "public interests in . . . release" other than the "FOIA's central purpose," 489 U.S. at 775, on any particular language in

[10] It is worthy of note that, although the premise of petitioners claim is that this case must be treated as a *pure* FOIA case—and must therefore be governed by *Reporters Committee*—petitioners also tacitly recognize the weakness of this premise by retreating from its logic. For example, petitioners do not contend that an exclusive bargaining representative, seeking to obtain personnel information under the Federal Labor Statute, must conform to the FOIA's reqirement that each request be "in accordance with [an agency's] published rules stating the time, place, fees (if any) and procedures to be followed" for making FOIA requests. *See* 5 U.S.C. § 552(a)(3); *see also id.* § 552(a)(4)(A) (discussing agencies' FOIA rights to require fee payments for costs associated with FOIA requests). And, petitioners do not argue that an agency would be privileged to refuse to provide an exclusive representative with information on the basis that, for example, the exclusive representative has failed to pay FOIA-associated fees.

the FOIA, much less on any "plain" or "inherent" meaning of the statutory language. Both before and after *Reporters Committee*, the word "unwarranted" means without "justification" in terms of whatever interests may be relevant to the inquiry. *Reporters Committee* refuses to sanction an assessment of amorphous "public interests," such as the one the claimants there proffered, because Congress in the *only statute relevant to the case* —the FOIA—had only articulated the interest in "shedding light on an agency's performance of its statutory duties."

This case presents a very different context for decision, a context in which there is an *additional* statute at issue that does state an *additional* "public interest . . . in release." The party seeking disclosure here is not seeking a free-wheeling assessment by the Court of "public interests" that Congress has neither articulated nor made relevant through legislation, but rather consideration of a statute which clearly declares an important public interest that would be served by disclosure of the information. And, here the methodology of *Reporters Committee—viz.*, looking to the relevant statutory background, structure, and purpose—militates for *inclusion* in the Exemption 6 balance of the proffered public interest in release (the interest in an effective federal collective bargaining system that is stated in the *Federal Labor Statute*) not its exclusion.

(ii) It is of equal importance that petitioners' position undermines the purposes of the Federal Labor Statute. Indeed, petitioners' position is that the public interests declared in the Labor Statute, *see* 5 U.S.C. § 7101(a), are to be given *no weight whatsoever* in an important area of the Act's administration, with the result that the public interest in an effective federal collective bargaining system is subordinated in all cases to individual privacy interests, no matter how compelling the public interest, and no matter how slight the privacy interests.

(iii) The Federal Labor Statute, moreover, provides no support for the proposition that Congress had any intent—much less a specific intent—to bring about such an anomalous result. The most obvious referent for the statutory language stating that an agency's disclosure obligation only goes "to the extent not prohibited by law" is that class of federal nondisclosure statutes that state unequivocal non-disclosure policies. Given the nature of such statutes, *see* note 3, *supra*, there was every reason to include in the Federal Labor Statute a ban on the disclosure already prohibited and no reason to believe that doing so would have any substantial impact on the effectiveness of the collective bargaining system. At the same time, the "to the extent not prohibited by law" language has no similarly clear prohibitory meaning in the case of a statute, such as the Privacy Act, whose non-disclosure policy is subject to exceptions that involve a balancing of the relevant public and private interests.

In the case of such a statute, it is at least as likely as not that Congress intended that the newly declared public interest in collective bargaining should be a part of the required balance, and thus should be a factor in determining whether disclosure would be prohibited. *See* 5 U.S.C. §§ 552(b)(6), 552a(b)(2). Given the nature of the Privacy Act—covering, as it does, almost all personally identifiable employment records—a contrary intent would seriously cripple the effectiveness of federal sector collective bargaining. Particularly in light of the fact that the Federal Labor Statute language at issue was never even discussed in the legislative reports or debates, much less explained in the terms petitioners explain it, there is no basis for assigning to Congress such an unlikely and self-defeating intent.

(iv) The legal background to the Federal Labor Statute strongly militates against petitioners' position. Congress expressly rested its conclusion that collective bargaining would serve the public interest on the private sector

collective bargaining experience with which the Legislature was fully familiar. *See* 5 U.S.C. § 7101(a)(1). Accordingly, Congress modelled many aspects of the statute —including the system of collective bargaining based on exclusive representation, the employer obligation to bargain in good faith, and the union duty to fairly represent all members of the bargaining unit—on the NLRA. *See* pp. 11-12, *supra*. As we have discussed, it was well established NLRA law at the time that Congress drafted, debated, and enacted the Federal Labor Statute, that the information at issue here is necessary to the collective bargaining process, and within the employer's disclosure obligation. *See id.* (listing cases).[11]

6. Against the foregoing, petitioners have argued that "most federal agencies" will furnish unions with individualized personnel information when it is truly "necessary" to collective bargaining pursuant to regulations promulgated by the Office of Personnel Management ("OPM") governing disclosures to unions under the Privacy Act's "routine use" exception, 5 U.S.C. § 552a(b)(3). Br. Pet. 28 n.8; *see also id.* at 9-10 n.2. *See generally* Federal Personnel Manual Letter 711-164 (1992) ("FPM Letter") (official interpretation of OPM "routine use" regulations as they relate to disclosures to unions); 49 Fed. Reg. 36,949, 36,956 (1984) (OPM "routine use"

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[11] We note in this regard that—just as the FLRA would do under its construction of the Federal Labor Statute—the NLRB, in analyzing union requests for personnel information, engages in a balancing process accounting for *both* the interests of the collective bargaining system and the competing employee privacy interests. Thus, under the NLRA—as under the Federal Labor Statute, properly construed—employee privacy interests are recognized as valid interests that must be weighed in the legal balance in determining whether information relevant to collective bargaining must be disclosed to the exclusive bargaining representative. *See Detroit Edison v. NLRB*, 440 U.S. 301 (1979); *United Aircraft Corp.*, 192 NLRB 382, 390 (1971).

regulations).[12] This "reassurance" has a hollow sound to it.

To be sure, the OPM regulations—which only cover agencies within OPM's jurisdiction and which were promulgated under Privacy Act authority (and not under any Federal Labor Statute authority)—do instruct agencies to disclose information to exclusive representatives "when relevant and necessary to their duties of exclusive representation," FPM Letter, at 2; *see also* 49 Fed. Reg. 36,949, 36,956.

But OPM has construed *the scope* of an agency's disclosure obligations under these regulations—*viz.*, the meaning of the terms "relevant" and "necessary"—*far more narrowly* than the FLRA has construed the scope of an agency's disclosure obligations under the Federal Labor Statute. *See* 5 U.S.C. § 7114(b)(4). (For example, OPM rejects the proposition that exclusive representative should have access to employee home addresses, *see* FPM Letter). And, while OPM justifies these regulations in terms of Federal Labor Statute policies, OPM has persisted in its *refusal* to conform its interpretations to the interpretations of the FLRA. *See* FPM Letter, *supra*; Br. Pet. 9-10 n.2; *see generally Bureau of Alcohol, Tobacco, & Firearms*, 46 FLRA No. 22, Slip. op. at 10 (1992); *FLRA v. U.S. Dept. of Navy, supra*, 966 F.2d at 761-765; *FLRA v. U.S. Dept. of Treasury, supra*, 884 F.2d at 1453-1456.

Far from satisfying the policies of the Federal Labor Statute, petitioners' insistence that exclusive bargaining representatives rely on OPM's "routine use" regulations

[12] Under the "routine use" exception to the Privacy Act, 5 U.S.C. § 552a(b)(3), an agency may disclose information that would otherwise be protected by the Privacy Act if the disclosure is "for a purpose which is compatible with the purpose for which it was collected," *id.* § 552a(a)(7) (defining "routine use"), and if the agency has published in the Federal Register a notice designating that purpose as a "routine use," *id.* § 552a(e)(4)(D).

for access to the personnel information those representatives need, vividly illustrates the degree to which Congress' Federal Labor Statute policies have been subverted.

First, by petitioners' own measure, the OPM regulations are woefully under-inclusive. As petitioners argued below, the OPM regulations do not govern all agencies covered by the Federal Labor Statute, and, indeed, do not cover the agencies whose conduct is at issue in this very case. *See* Brief for the Respondents/Cross-Petitioners, Fifth Circuit No. 90-4722, at 41-44 (arguing that employees paid from nonappropriated funds of the military exchanges are not within OPM regulations, *citing* 5 U.S.C. § 2105). And, as far as we are aware, no other "routine use" regulation has been promulgated to give exclusive representatives of the employees of these agencies *any access whatsoever* to personnel information, no matter how "necessary" access may be to effective collective bargaining.

Second, the availability to agencies of the "routine use" exception serves to underline—not to alleviate—how far petitioners have gone in undermining the Federal Labor Statute's collective bargaining system. Petitioners' argument, in effect, concedes that the information at issue here *can*, "consistent with law," be supplied to an exclusive representative, as long as "routine use" regulations are drafted to allow for such disclosure. There can be no more vivid demonstration that what is at issue here is *not* a determination *by Congress* that these employee records be kept from exclusive representatives, but simply a discretionary determination by *agency management*. In other words, the limitation on the federal agency's obligations to provide collective baragaining information urged by petitioners do not flow from a "prohibit[ion] by law"—under any reasonable construction of that term—but from judgments by the agencies themselves regarding the extent to which they are willing to provide the information.

This turns the legal relationship between federal sector employers and federal sector exclusive bargaining representatives that was intended by Congress in the Federal Labor Statute on its head. The Labor Statute—in order to establish the preconditions of a collective bargaining system—grants *rights* to labor organizations that federal agencies are obligated by law to respect and that are enforceable against the agencies through FLRA proceedings. Congress did not intend that the ability of labor organizations to perform their role should depend on the discretion and good favor of agency managements.[13] Among those rights are the rights to necessary information set out in § 7114(b)(4).

Petitioners, however, would make union access to necessary personnel information dependent on the judgments and regulations adopted by agency managements. If the agency desires to have no disclosure of necessary personnel information, all that the agency need do is fail to include any provision for disclosures to unions in its "routine use" regulations. That is what has happened in the instant case. Alternatively, if the agency chooses to allow *some* disclosures, but also insists on determining for itself what the standards of disclosure should be—thereby making unions dependent on agency discretion, establishing the agency as the judge in its own cases, and, most dramatically, appropriating to the agency the role assigned by Congress to the FLRA—that is permissible as well. That description fairly characterizes the OPM regulations.

[13] *See Bureau of Alcohol, Tobacco, & Firearms v. FLRA*, *supra*, 464 U.S. at 92-93 ("The new Act, declaring that "labor organizations and collective bargaining in the civil service are in the public interest," 5 U.S.C. § 7101(a) significantly strengthened the position of public employee unions. . . . The Act replaced the management-controlled Federal Labor Relations Council with the FLRA, a three-member independent and bipartisan body within the Executive Branch with responsibility for supervising the collective bargaining process and administering other aspects of federal labor relations established by [the Act]. § 7104. The Authority['s] role . . . in the public sector is analogous to the National Labor Relations Board in the private sector, *see* H.R. Rep. No. 95-1403, p. 41 (1978).").

Neither of these options is the least bit compatible with the conception of collective bargaining intended by Congress in the Federal Labor Statute.

For these reasons, petitioners proffered interpretation of the Labor Statute and its interplay with the Privacy Act and FOIA must be seen for what it is: an entirely unlikely interpretation that is not compelled by statutory language or background, and that is simply untenable in terms of the policies that Congress embraced in the Labor Statute. As such, it should be rejected.

CONCLUSION

For the above-stated reasons, and those stated by the respondent Federal Labor Relations Authority, the judgment below should be affirmed.

Respectfully submitted,

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